No. 11237

In the United States Circuit Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

THE ATCHISON, TOPEKA & SANTE FE RAILWAY COMPANY, APPELLEE

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

BRIEF FOR APPELLANT

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CITATIONS

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STATEMENT OF BASIS OF JURISDICTION

This is an appeal from a judgment [R. 34] rendered against the appellant, United States of America by the District Court of the United States for the Northern District of California, Northern Division, upon a finding [R. 12 et seq.] for the appellee in a civil action under the Safety Appliance Acts, Title 45 U. S. C. §§ 1 to 16, the Complaint [R. 2] having been filed on May 2, 1944.

The District Court had jurisdiction under 45 U. S. C. § 6 and this court has jurisdiction under 28 U. S. C. §§ 211 and 225 (a).

Following the judgment, the appellant duly filed its Notice of Appeal from said judgment against it within the time prescribed by law [R. 35].

Thereafter, the appellant duly filed a Designation of Portions of Record To Be Contained in Record on Appeal, within the time prescribed by law [R. 35].

Thereafter a Reporter's Transcript containing all of the evidence in the case [R. 39–110], was prepared and the Transcript of Record in this case including said Reporter's Transcript was filed with the Clerk of this Honorable Court, and a Designation of Record on Appeal and Statement of Points on which Appellant Intends to Rely [R. 111] was duly filed with the Clerk of this Honorable Court.

STATEMENT OF THE CASE

This is a civil action under the Safety Appliance Acts, Title 45 U. S. C., §§ 1–16. There are four causes of action, and a judgment for $400 and costs is prayed for. The case was tried without a jury. Some of the facts were agreed to by written stipulation [R. 41–47]. Oral testimony was introduced by both parties [R. 51–110].

The first three causes of action relate to the hauling or using of three freight cars upon which one of the automatic couplers on each car was inoperative, thus making it necessary for men to go between the ends of the cars in order to operate the couplers on those cars. The fourth cause of action is based on the hauling or using of a freight car upon which one of the side handholds was bent in against the side of the car, thus rendering that appliance insecure and ineffective. Handholds of this nature are required by statute to be placed on freight cars "for greater security to men coupling and uncoupling cars." 45 U. S. C., § 4.

None of the cars involved in this action became defective on appellee's line of railroad, but they were delivered to the appellee at Stockton, California, on April 4, 6, and 7, 1944, hauled by appellee to its Mormon yard, approximately one mile distant, and later returned by appellee to the interchange tracks of delivering carriers.

Appellee claims that it had not accepted the defective cars, but that in hauling them to and from its Mormon yard, it was engaged only in the incidental handling necessary to disconnect them from other, nondefective cars, and return them to the delivering carriers.

A blueprint map was filed with the court below showing the lay-out of tracks where the cars were received, the point to which they were hauled by the appellee, switched out, and later returned, as well as the connecting and adjacent tracks [R. 53].

The car named in the first cause of action was hauled by the Southern Pacific Company to the Southern Pacific-Atchison, Topeka & Santa Fe Railway (commonly and hereafter referred to as the Santa Fe) interchange tracks, which are shown on the map as extending diagonally across square 284 of the map, and left there for delivery to appellee.

The cars referred to in the second, third, and fourth causes of action were hauled by the Western Pacific Railway to the Western Pacific-Santa Fe interchange tracks, which are shown on the map as extending diagonally through square 291 of the map, and left there for delivery to appellee.

Upon arrival of these cars, together with other cars, on the interchange tracks, they were inspected by a joint interchange inspector in the employ of the three above-mentioned railroads, including the appellee, at which time the defects complained of were discovered. Instead of physically rejecting these cars, the inspector placed "Bad Order" tags on them and sometime later appellee hauled the entire cuts of cars of which these cars were a part, to its Mormon yard, which is $^{8}/_{10}$ of a mile from the Southern Pacific-Santa Fe interchange tracks, and $^{7}/_{8}$ of a mile from the Western Pacific-Santa Fe exchange tracks.

Upon arrival of the defective cars in its Mormon yard, appellee performed the switching necessary to separate them from the non-defective cars, and several hours later the cars named in the complaint were hauled back by appellee to the delivering carriers. Appellee made no effort to repair the cars either on the interchange tracks or in its Mormon yard.

This action is based upon title 45 of the U. S. C. §§ 1 to 16. Sections 2 and 4 are as follows:

> SEC. 2. AUTOMATIC COUPLERS. It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.
>
> SEC. 4. GRAB IRONS OR HANDHOLDS FOR SECURITY IN COUPLING AND UNCOUPLING CARS. Until otherwise ordered by the Interstate Com-

merce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars.

Section 13 contains a proviso, reading as follows:

> * * * *Provided,* That where any car shall have been properly equipped, * * * and such equipment shall have become defective or insecure while such car was being used by such carrier upon its line of railroad, such car may be hauled from the place where such equipment was first discovered to be defective or insecure to the nearest available point where such car can be repaired, * * * if such movement is necessary to make such repairs and such repairs cannot be made except at such repair point; * * *

Section 14 provides in part as follows:

> SEC. 14. LIABILITY FOR USING CAR WITH DEFECTIVE EQUIPMENT EXCEPT AS SPECIFIED. Except that, within the limits specified in section 13 of this title the movement of a car with defective or insecure equipment may be made without incurring the penalty provided by the statutes, but shall in all other respects be unlawful, * * *.

QUESTIONS INVOLVED

The basic contentions flowing from the Statement of Points on which appellant intends to rely (eleven in number below) [R. 111–114] involve the following questions:

1. May a carrier lawfully accept cars having defective safety appliances from a delivering carrier, haul such cars to its own yard, nearly a mile away, switch the cars out from other cars, and later return the defective cars over the same route to the delivering carrier in the same condition as when received?

2. Did the handling of these cars as set forth in question No. 1 constitute an acceptance of the cars by appellee from the delivering carriers?

3. Did the movements of the cars referred to in question No. 1 constitute only the incidental movement necessary to carry out appellee's avowed refusal to accept the cars?

STATEMENT OF POINTS ON WHICH APPELLANT RELIES

1. The District Court erred in holding that as to each of the cars involved in this action the "defendant * * * refused to accept said car in its defective condition" (Findings of Fact IV in each cause of action).

2. The District Court erred in holding that the movement by the defendant to each of the defective cars was "incidental to and necessary in disconnecting it from the remaining nondefective cars and returning it" to the delivering carrier (Findings of Fact VII in each cause of action).

3. The District Court erred in holding that the movement by the defendant of each of the defective cars "included only the minimum number of switching operations necessary to disconnect the said car from the remaining nondefective cars and to return

it" to the delivering carrier (Findings of Fact VIII on each cause of action).

4. The court erred in holding that the movement of each of the defective cars by the defendant "was the most practical method of disconnecting said car from the nondefective cars and returning it" to the delivering carrier "which could have been adopted under operating conditions prevailing at said place on said date" (Findings of Fact IX on each cause of action).

5. The court erred in holding "that the method adopted by defendant in disconnecting" each of the defective cars "from the nondefective cars with which it was delivered and returning it" to the delivering carrier "subjected its employees to no greater hazard than any other method of disconnecting said car and returning it would have subjected them" (Findings of Fact XII of each cause of action).

6. The court erred in holding as to each of the defective cars "that any other method of disconnection of said car from the nondefective cars and its return would have created additional hazards to employees operating trains on the main line of defendant company and to the general public using railroad crossings in the vicinity of the said interchange track" (Findings of Fact XII on each cause of action).

7. The court erred in holding that the movement by the defendant of each of the cars involved in this action "after its refusal in interchange for the purpose of and incidental to disconnecting it from nondefective cars and returning it to the delivering carrier, as found by the court to be a fact, does not con-

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stitute a violation of the provisions of the United States Code, Title 45 Sections 1 to 16, inclusive" (Conclusions of Law I on each cause of action).

8. The court erred in holding "that the method used by the defendant in disconnecting" each of the cars involved in this action, "from the other cars and returning it to the delivering carrier, as * * * found by the court to be the most practical under operating conditions prevailing and further found to be no more hazardous than any other method, was properly selected by defendant and was within its discretion to select over other possible methods" (Conclusions of Law II on each cause of action).

9. The court erred in holding that "the defendant has not violated the provisions of United States Code, Title 45, Sections 1 to 16 inclusive" as to any of the cars involved in this action (Conclusions of Law V on each cause of action).

10. The court erred in holding that on each "cause of action defendant is entitled to judgment against plaintiff" (Conclusions of Law VI on each cause of action).

11. The court erred in holding in effect that a carrier knowing cars to be defective before they come into its possession and while asserting refusals to accept them from delivering carriers, may move them approximately a mile and a half over its own lines and justify doing so on the ground that the hauling was only such as was necessary to disconnect them from other cars and redeliver them to the delivering carriers (Finding of Fact III, IV, VI and VII and Con-

clusions of Law I, II, V, and VI on each cause of action).

ARGUMENT

That the requirements of the Safety Appliance Acts are absolute and that nothing less than literal compliance therewith will suffice, is well settled. *St. Louis, Iron Mountain and Southern Ry.* v. *Taylor,* 210 U. S. 281 (1908), 52 L. Ed. 1061; *Chicago, Burlington & Quincy Ry.* v. *United States,* 220 U. S. 559 (1911) 55 L. Ed. 582; *Chesapeake & Ohio Ry.* v. *United States,* 249 Fed. 805 (C. C. A. 6, 1918); *Southern Pacific Co.* v. *United States,* 23 F. (2d) 61 (C. C. A. 8, 1927).

Under the *original* Safety Appliance Act, as construed by the Supreme Court and by other courts, *any* movement of a car having defective safety appliances subjected the carrier to the statutory penalty. To relax somewhat the harshness of this rule, Congress passed the Act of April 14, 1910, outlining a method whereby cars with defective safety appliances could be hauled for purpose of repair, *but only for repair purposes.* This proviso is now included in section 13, set out on page 5 of this brief. While courts have been called upon a number of times to construe this proviso, attention is directed to only a few citations which hold that this proviso is to be strictly construed and limited to its express terms.

In *Chesapeake & Ohio Ry.* v. *United States,* 226 Fed. 683, 686 (1915), the Circuit Court of Appeals for the Fourth Circuit said:

> Without multiplying citations, it is sufficient to say that the original act as construed by the courts made the carrier liable for any and every movement on its line, in interstate commerce, of a car whose coupling apparatus was out of order. Under no circumstances could such a car be hauled or used without violating the statute; and the penalty was incurred, when a car was moved in a defective condition, even if the carrier had been vigilant to discover the defect and was actually unaware of its existence. Indeed, it was the severity of this absolute prohibition, which did not exempt the necessary movement to a repair shop, that led to the remedial amendment above quoted. But the relief thereby granted is limited by its express terms and manifest intent, and there is no warrant for its further extension. It permits the transfer without penalty of a disabled car to "the nearest available point" where it can be repaired, provided such transfer is necessary because the defects cannot be remedied at the point where they are first discovered, and that is the only movement which does not subject the carrier to liability.

In *Chesapeake & Ohio Ry* v. *United States,* 249 Fed. 805, 807 (1918), the Circuit Court of Appeals for the Sixth Circuit in construing this proviso, said:

> The Safety Appliance Act as originally passed, being remedial and humanitarian in its purpose, is broadly construed, and in clear and unequivocal language imposes on the defendant, as it did on all other interstate railroads, the absolute and unqualified duty of maintaining the safety appliances on its cars in a secure condition.

> By its provisions movement on its line, in interstate commerce, of a car with a defective appliance subjected the defendant to a penalty; and this was so, even if it had been vigilant to discover the defect and was actually ignorant of its existence. It being the purpose of the act to produce the highest degree of care in the inspection of cars, for the protection of the lives and limbs of employés, knowledge of defects, diligence in detecting them, and wrong intent in transporting cars with defective appliances, were not made ingredients of the acts condemned. * * * To relax somewhat the rigid rule prescribed by the original act, which did not exempt the necessary movement to a point where repairs could be made, the amendment of April 14, 1910, was enacted. Although the amendment measurably grants relief to and enlarges the right of interstate railroads, it nevertheless is limited by its express terms and manifest intent, and its further extension is unwarranted.

To the same effect is the case of *Denver & Rio Grande R. R.* v. *United States,* 249 Fed. 822, 827 (1918), wherein the Circuit Court of Appeals for the Eighth Circuit said:

> Straightened is the gate and narrow the way marked out by the proviso for the movement of a defective car. Any departure from that narrow way is made by section 5 [Now 45 U. S. C. § 14] of the act unlawful, and subjects the carrier to the penalty of the statute. These restrictions were necessary to prevent the Safety Appliance Law from being destroyed by the privilege granted by the proviso. Congress showed

> plainly its purpose that this result should not occur, by the reiterated safeguards, negative and affirmative, which it placed around the privilege.

Thus it is seen that not only was Congress zealous to prevent the beneficial purposes of the Safety Appliance Acts from being destroyed by unwarranted extensions of the privilege of moving for purpose of repair, by the safeguards set up in sections 13 and 14, quoted *supra,* but various circuit courts of appeal, as well as district courts have been equally zealous in restricting the privileges granted in section 13. It is quite clear that the district court in the case at bar has undertaken to grant the type of unwarranted extension of the privilege of handling cars with defective safety appliances which the Circuit Court of Appeals for the Eighth Circuit warned against in the *Denver & Rio Grande* case, *supra.*

The appellee based its whole defense, in the court below, on dicta of the Circuit Court of Appeals for the Sixth Circuit in *Baltimore & Ohio Southwestern R. R.* v. *United States,* 242 Fed. 420, 425 (1917) reading:

> We add that, in our opinion, in case a defective car is received from a connecting carrier in a string or train of cars, the mere incidental handling of such car by the receiving carrier, refusing to accept it, in such manner as may be necessary to disconnect it from the other cars for redelivery to the connecting carrier and to proceed with the use of the other cars, would not be a use or hauling of such defective car by the receiving carrier which would subject it to the penalties of the Act; such incidental handling of the car not being in contravention of

> the purposes of the Act, but a necessary step in furtherance thereof.

However, on page 424 of the opinion just referred to, the Court said:

> We are of opinion that the necessary effect of the clause, "and such equipment shall have become defective or insecure while such car is being used by such carrier upon its line of railroad," as used in this proviso, is to limit the right of hauling a defective car for repairs, without penalty, to the carrier upon whose line of railroad the car was being used when the equipment became defective.

The case just cited was decided upon the government's demurrer to the carrier's answer, the latter having (see p. 422) "alleged that the *defendant received this car on its line* from a connecting line of railroad; that immediately on *receipt* * * * the defendant's inspectors discovered it to be defective; * * * and that * * * the defendant hauled it to its shop, * * * at which it could be repaired." [Our italics.] This, the court condemned. The delivery to the defendant had been completed and there was, on the factual allegations of that case, no question involving any incidental hauling for the purpose of disconnecting the car for return to the delivering carrier. That the above quote from page 425 of the *Baltimore & Ohio Southwestern* case opinion, relied upon by the district court in this case, *loc. cit.* 584, is as we assert dicta merely, is evidenced by the fact that the judgment for the United States, upon which the railroad brought error, was

affirmed by the Sixth Circuit Court in that case. It seems clear therefore that the Sixth Circuit Court never intended to stretch the law so far as the district court has in the instant case. No one connected with the present case is qualified to state just what the circuit court of appeals meant or what induced it to insert the quoted dicta in that opinion. We are strongly of the view that the court had in mind a situation in which as in the *Baltimore & Ohio Southwestern* case, a carrier discovers just *after receipt on its line,* a car delivered to it in defective condition. It has the car on its hands and has to make some disposition of it. It cannot legally haul it upon its own line for the purpose of repairs (as the defendant did in that case) or otherwise and the incidental hauling *necessary* to disconnect it from the other cars and send it back to the delivering carrier would not be in violation of law. This view finds support in a later decision by the same circuit court of appeals in *United States* v. *Louisville & Jefferson Bridge & R. R.,* 1 F. (2d), 646 (1924). In that case "the defendant * * * a terminal company * * * *receiving in its yard* cars delivered there by the Illinois Central Railroad" had "pushed in upon *the Terminal Company's* interchange track a cut of some twenty cars" (*doc. cit.* p. 647) among which was the defective car involved in that case. [Our italics.] Shortly thereafter an inspection revealed the presence of the defective car. The defendant terminal company had the car on its hands and had to do something about it. It disconnected the car from the non-defective cars and returned it to the delivering carrier, and its ac-

tion in so doing was approved by the Court. It is to be observed that the defective car, in that case, was not as in the instant case, on an interchange track *between* the line of the delivering carrier and that of the appellee, but was "upon the Terminal Company's interchange track" which was within its own yard. It is to be noted also, that in that case, the defect was discovered *after* the car came into the possession of the defendant, while in the present case, the appellee knew long before it received the cars that they were defective, and in hauling them to its own yard, instead of notifying the carrier that it would not accept delivery, it did so at its peril. Faced in the *Louisville and Jefferson Bridge* case, with the question as to which road was to haul the defective car back to the delivering carrier's line, the court held quite properly that it would involve no more danger for the receiving carrier to haul it back than if the hauling were done by the delivering carrier. The hauling by the receiving carrier in that case was *toward* the delivering carrier's line, *one* movement of the defective car, which could be performed by either road without increasing total dangers, while in the instant case there were *two* movements, both by the receiving carrier, one way from the delivering carrier's lines for almost a mile, and the other back to the delivering carrier's lines, a very obvious doubling of total dangers. Furthermore, in the *Louisville & Jefferson Bridge* case, the defect involved was to the running board on top of the car which the Sixth Circuit Court indicated, page 648, is seldom, if ever, used when the train is in motion, since the train movement is con-

trolled by air brakes and it is unnecessary for trainmen to use the running board to reach the handbrake. But in the instant case, the defective appliances were couplers and handholds, which are quite essential to the safety of employees in switching operations such as were performed by the defendant in its handling of the defective cars.

In *United States* v. *Northern Pacific Ry.,* 293 Fed. 657 (1924) this court, referred with approval to the dicta in the *Baltimore & Ohio Southwestern* case, *supra.* In the *Northern Pacific* case, this court had before it a situation in which the defective car had been received by the defendant carrier in its own yard before it discovered the defect. In that respect, the facts of the case were like those in the *Louisville & Jefferson Bridge* case, *supra.* But the case differs very vitally from the facts in the *Louisville & Jefferson Bridge* case, the Northern Pacific Ry. having hauled the car for purposes of repair. It was quite properly penalized because the car had not become defective or insecure upon its line of railroad. It becomes quite clear therefore, that the exception referred to when the court in the *Northern Pacific* case said (loc. cit. p. 660): "True, the act does not prohibit a mere incidental movement, such as a movement for the purpose of reaching other cars on the exchange track, as held in *Baltimore, Etc. Ry. Co.* v. *United States,* 242 Fed. 420," was mere dicta when cited by this court, for the very obvious reason that the *Northern Pacific* case, *on its facts,* involved no question of incidental hauling or switching of the defective car for return to the delivering carrier.

Appellee admits that it could not lawfully haul these defective cars for purpose of repair, which would involve one movement, but insists that it could haul them almost a mile to its Mormon yard, switch them out and return them over the same distance to the delivering carrier, *two* movement, without violating the law.

It is well known that the purpose of the Safety Appliance Acts is to provide safety to the employees and the traveling public. If the construction placed upon these Acts by the court below is correct, the law is weakened and the means of carrying out its beneficial purpose is seriously impaired.

In his first message to Congress in 1889, urging the passage of a safety appliance law, President Harrison said:

> It is a reproach to our civilization that any class of American workmen should, in the pursuit of a necessary and useful vocation, be subjected to a peril of life and limb as great as that of a soldier in time of war (21 Cong. Rec. 90 (1889)).

According to recent press dispatches, more Americans were accidentally killed or injured in civilian activities during the period covered by the recent war than in military activities. If the appellee is within its rights in hauling bad-order cars back and forth as in the case at bar, such a practice may, and probably will be multiplied by the number of points at which carriers interchange cars, and since every defective car is a potential source of danger, our already large toll of killed and injured in industrial and traffic accidents will be furthered augmented.

Appellee seeks to justify the manner in which it handled these cars by carrying to a dangerous limit suggestions contained in the *Baltimore & Ohio Southwestern* and *Northern Pacific* cases, *supra,* for the handling of cars *where the delivery and acceptance had been completed* and subsequent inspections disclosed that the safety appliances were out of repair. The claims of heavy traffic conditions, convenience of the carrier, etc., have also been advanced by appellee as reasons for disregarding the plain mandates of this humanitarian law. Such claims have been advanced from time to time since the enactment of the statute, but without success.

District Judge Bledsoe of the District Court for the Southern District of California in *United States* v. *Atchison, Topeka & Sante Fe Ry.,* 220 Fed. 215, 217 (1915), said:

> * * * Under such circumstances this court feels that considerations of "convenience," "practicability," or "expediency" should not be permitted to fritter away or lessen the most commendable purpose of the act in question, * * *.

These same claims of convenience were answered in *Virginian Ry.* v. *United States,* 223 Fed. 748 (C. C. A. 4, 1915); *Pennsylvania Company* v. *United States,* 241 Fed. 824 (C. C. A. 6, 1917); *Galveston, Houston & Henderson R. R.* v. *United States,* 265 Fed. 266 (C. C. A. 5, 1920); *Chicago & Erie R. R.* v. *United States,* 22 F. (2d) 729 (C. C. A. 7, 1927).

Appellee contends that it did not accept the cars named in the complaint but that all the hauling of

them it did was the incidental movements necessary to receive the cars that were in good order and reject the defective ones and return them to the delivering carriers.

Since the question of intent was left out of the bill when this law was under consideration by Congress, what the appellee did in the instant case must be determined by what was *actually* done, rather than by any claims of intent. What appellee did in this case is exactly what it would have done, if it did not deny acceptance of the cars, except it would not have hauled them back to the delivering carriers. Certainly its employees were subjected to the same dangers they would have had to face in accepting the cars, plus the dangers in hauling the cars back to the delivering carriers. Every car with defective safety appliances is a constant source of danger.

No movement of the defective cars was necessary in this case for the appellee to carry out its avowed purpose of refusing to accept the cars. They had not reached the appellee's yard or tracks as in the *Louisville & Jefferson Bridge* and *Northern Pacific* cases, *supra,* but were on a mere transfer track. Appellee had full knowledge of the condition of these cars before handling them. The defective cars were the responsibility of the delivering carriers. Had appellee been as diligent in protecting its employees from the dangers of handling defective cars as it has been in seeking to justify the movements complained of after suit has been filed, no movement of these cars would have been made.

Prior to Rule 75 (g) of the Federal Rules of Civil Procedure, 28 U. S. C. A. following sec. 723c (effective Sept. 16, 1938), an opinion of a district court would not have formed a part of the record on appeal to a circuit court, *United States* v. *John Ii Estate, Ltd.,* 91 F. (2d) 93 (C. C. A. 9), *cert. denied,* 302 U. S. 746 (1937), and the right of either party to comment upon its contents was somewhat circumscribed. However, Rule 75 (g) requires that there shall always be certified and transmitted to the circuit court among other things, whether designated by the parties or not, copies of any opinions filed below or delivered in the case and the rule states that "matter so certified and transmitted constitutes the record on appeal." It may properly be urged that the effect of this rule is to make the opinion a part of the record on appeal and to, in this respect, require a departure from the holding in the *John Ii Estate* case, supra, and others like it. Then, too, at the very outset of the Rules of this Court, it is stated that "The Federal Rules of Civil Procedure, whenever applicable are hereby adopted as part of the rules of this court with respect to appeals in actions of a civil nature." But even, before Rule 75 (g), transmission of the "opinion or opinions of the [lower] court" (among other things) was required by Rule 14 (1) of this Court, in force at least until it was in this respect supplanted by Rule 75 (g) of the Federal Rules of Civil Procedure, supra, and the opinion was regarded as "one of the papers or proceedings necessary or material to the review," Cyc. of Fed. Proc. 2d Ed., Sec. 5552, and altho (prior to Rule 75 (g)) not part of the "record," the "opinions

so sent up serve the purpose of explaining and giving understanding of what was done, as shown by other parts of the record," *ibid. Nashua & Lowell Railroad Corp.* v. *Boston & Lowell Railroad Corp.,* 61 Fed. 237, 240–241 (C .C. A. 1, 1894); *Teller* v. *United States,* 111 Fed. 119 (C. C. A. 8, 1901).

Contrary to the terms of Rule 75 (g), the Clerk of the District Court has not included in his certification and transmission of the record, the opinion of that court. It is the appellant's intention to obtain a certified copy of the opinion and to offer the same for filing in this court, to be printed as a supplement to the present record. This cannot be accomplished prior to the filing of this brief and accordingly the appellant in discussing the opinion must refer to the same as reported in *United States* v. *Atchison, Topeka & Sante Fe Ry.,* 61 F. Supp. 580 (1945).

The opinion of the district court contains several misconceptions of the requirements of the Safety Appliance Acts as construed by the courts.

In paragraph [1] of the opinion, *loc. cit.* 582, the appellee is excused for doing what it did because the lower court found that it had acted in good faith. The Supreme Court has long held that the requirements of the Act in question are absolute and that nothing less than *literal* compliance with its terms will suffice. No room accordingly is left for the application of any doctrine predicated upon considerations of "good faith." See *St. Joseph & Grand Island Ry.* v. *Moore,* 243 U. S. 311, 315 (1917), 61 L. Ed. 741, 746; *St. Louis, Iron Mountain and Southern Ry.* v. *Taylor, supra,* 294–296, L. Ed. 1067–1068.

In paragraph [2] of the opinion, *loc cit.* 582, the district court raises the question of "use" of the cars, stating that such use must be substantial and primarily connected with actual transportation of persons or property for hire. The statute by its terms (45 U. S. C. § 13) imposes the penalty upon "Any common carrier * * * using, hauling, or permitting to be *used or hauled* on its line * * *" any defective car. [Our italics.] A defect on an empty car is just as much a source of danger as one on a loaded car, and in the case at bar the source of danger to the employees using these particular defective appliances is practically nonexistent when the trains are made up and moving, the principal danger being when the cars are being coupled and uncoupled. However, in *Brady* v. *Terminal Railroad Assoc.*, 303 U. S. 10 (1938), 82 L. Ed. 614, the Supreme Court held that where a car had been placed on an interchange track but had not as yet been accepted by the receiving carrier, it was in use by the delivering carrier, although at the time the car was motionless. To the same effect is *Chicago Great Western R. R.* v. *Schendel,* 267 U. S. 287 (1925), 69 L. Ed. 614; *Minneapolis, St. Paul & S. S. Marie Ry.* v. *Goneau,* 269 U. S. 406 (1926), 70 L. Ed. 335; *Cusson* v. *Canadian Pacific Ry.,* 115 F. (2d) 430, (C. C. A. 2, 1940).

In paragraph [4] of the opinion, *loc. cit.* 582, the statement is made that, "The spirit of the law calls for the exaction of the penalty only if the movement is of such substantiality, and under such circumstances, as to defeat the purposes of the enactment." The terms of the statute are, however, plain, pro-

viding a penalty for *any* movement of a car having defective safety appliances except under the proviso of Section 13, *supra*. There is no qualification of the movement condemned. In *United States* v. *Chesapeake & Ohio Ry.*, 213 Fed. 748, 752 (1914) the Circuit Court of Appeals for the Fourth Circuit held that the movement prohibited applied to movements in yards and on side tracks.

The court in paragraph [4] of the opinion makes much of the "reasonableness" of the application of the law. There is however no room to read into a statute which the Supreme Court has held to be absolute in its application, *St. Louis, Iron Mountain and Southern Ry.* v. *Taylor, supra; Chicago, Burlington & Quincy Ry.* v. *United States, supra,* the doctrine which the district court here sought to apply, of what might be termed "reasonableness absoluteness," in an effort to make the application of the statute *reasonably* absolute. To even state such a doctrine presents an incongruity. The court was clearly wrong in saying that the statute requires the exaction of the penalty only if the movement is substantial, but even so, a movement for a mile and a half ought to be regarded as a substantial one. Many of the decided cases have imposed penalties for much shorter movements. See for example *United States* v. *Northern Pacific Ry., supra,* at 660 where in similar circumstances the penalty was affirmed by this court for a movement "of half a mile or more."

The district court opinion, *loc. cit.* 583, undertakes to deal with the harshness of a literal construction of the law. In *St. Louis, Iron Mountain and Southern*

Ry. v. *Taylor, supra,* 295, L. Ed. 1068 the Supreme Court said: "It is urged that this is a harsh construction. To this we reply that, if it be true construction, its harshness is no concern of the courts. They have no responsibility for the justice or wisdom of legislation, and no duty except to enforce the law as it is written, unless it is clearly beyond the constitutional power of the lawmaking body." The construction contended for by the Government in the instant case is not a harsh one but is one in furtherance of the humane purposes of the Act. To permit appellee or other carriers to move defective cars back and forth at will between two or more points in the same yard is a harsh construction against the safety of the employees involved.

The district court opinion, *loc. cit.* 583, quotes from *United States* v. *Illinois Central R. Co.,* 156 F. 182, 190 (D. C. W. Ky., 1907) a supposed set of facts in which it is claimed that, in case an accident occurs to a train or cars en route and safety appliances become defective, the carrier would violate the law in moving the train at all. The Government makes no such claim, nor could it. In the supposed case, the accident would have occurred and the appliances would have become defective on the line of the carrier operating the train; and, under Section 13, *supra,* it would be permitted to move the train or cars to the nearest available repair point without penalty.

In the administration of this law, the Interstate Commerce Commission, "the executive officers" at whose instance these proceedings are brought, endeavor to apply that common sense referred to by the

district court in the last section of paragraph [4] of its opinion, *loc. cit.* 583, but cannot blind itself to the holding in *St. Joseph & Grand Island Ry. v. Moore, supra,* 315 L. Ed. 746, that nothing less than literal compliance with the terms of the statute will suffice.

In paragraph [5] of the district court opinion, *loc. cit.* 583, the court expresses the belief that section 13 of Title 45 of the code indicates "That leeway should be allowed to railroads with respect to repairs" by allowing the hauling of equipment "discovered to be defective or insecure to the nearest available point where such car can be repaired," and states "Necessarily, the determination of what is the 'nearest available point' and what is a reasonable movement of equipment involves judicial discretion." But, in the case at bar the appellee distinctly disclaims any movement for purpose of repair. In invoking section 13 to bolster its conclusion, the district court fails to take into consideration the terms of section 14, *supra.* Section 13 sets forth two points at which a carrier can repair cars which become defective on its lines without incurring a penalty. These, however, are strictly limited to the carrier upon whose lines the cars become defective. *No* remedy is offered to a receiving carrier. Section 14 states that except within the (narrow) limits specified in section 13, *all* other movement of defective cars is unlawful, thus evincing a determined purpose on the part of Congress to limit the movement of defective cars to the carrier upon whose lines they become defective. Had the appellee obeyed the injunction of this court set forth in the

language quoted (*loc. cit.* 583) by the district court from *United States* v. *Northern Pacific Ry.*, 287 Fed. 780, 784 (1923), it would have "refused [d] so to *haul* them" [our italics] after inspecting the cars and finding them defective. Thus the very case cited by the district court and decided by the circuit court of appeals for its own circuit refutes the district court's conclusion.

The district court in the concluding paragraphs of its opinion in the instant case adverts to the circumstance that the alleged violations took place in time of war when the traffic burden upon the defendant was unusually heavy. No one would undertake to question the war as being in its nature an emergency, but unlike the Hours of Service Law (45 U. S. C. §§ 61–64) Congress made no provision for relief from the absolute terms of the Safety Appliance Acts in case of an emergency and it appears that the appellee was using the war as a cloak to do what it knew to be unlawful. The Interstate Commerce Commission which has the administrative responsibility for enforcing the Safety Appliance Acts and at whose instance the present proceeding was brought, is made up of a body of transportation experts. It knew that the railroads were taxed beyond measure to carry the large volume of traffic offered them during the war. But in order to perform this task efficiently and expeditiously, the carriers had to rely upon experienced and unmaimed railroad men to operate the trains. In addition to carrying out the humane purposes of the law, the enforcement of these and other laws of a similar purpose was in furtherance and

not in dimunition of the war effort, by reason of the protection afforded to experienced railroad employees, troops, passengers and valuable cargoes of supplies, a not unimportant function in winning the war.

The penultimate paragraph of the district court's opinion is to the effect that the appellee was in need of the nondefective cars to which the defective cars were connected and that the evidence as a whole sustains appellee's actions as *reasonable* and *practical* under the circumstances. To contend that knowingly hauling cars with defective safety appliances for a distance of about a mile, switching them around and several hours later returning the same cars with the same defects, to their point of origin, is the most practical manner of handling them, and at the same time to carry out the purpose of the Safety Appliance Acts, is placing a strained construction on this highly remedial statute. It leads to the conclusion that practicability is the guiding star of operations of the appellee instead of safety to its employees and the traveling public. In *Pennsylvania Company* v. *United States, supra,* 830 the Sixth Circuit Court of Appeals in a Safety Appliance Act case answered this argument of convenience or practicability in these words:

> But arguments of convenience cannot prevail against an absolute and mandatory provision, designed for the protection, not only of employés of the given train, but of employés and travelers on other trains.

In *Spokane & Inland R. R.* v. *United States,* 241 U. S. 344, 351 (1916), 60 L. Ed. 1037, 1041, the Supreme

Court in answering the argument of difficulty in complying with the requirements of this statute, said:

> But this merely asserts that the statute may be violated with impunity if only the railroad finds its provisions onerous or deems it expedient to do so.

This thread of inconvenience to the carrier, coupled with the theoretical delay unnamed trains might possibly be subjected to if the appellee attempted to switch out the defective cars at the interchange tracks before movement to its Mormon yard began, ran through the entire defense and found support in the district court's decision. The position of the appellee at the trial and in its trial brief gave no evidence of any concern or responsibility for carrying out the remedial purposes of the Safety Appliance Acts and furnishing the protection demanded by the statute for the employees and the traveling public. In similar fashion these considerations are also lacking in the district court's opinion.

If the decision of the district court in this case is allowed to stand, it will be an invitation to other carriers to haul cars with defective safety appliances back and forth at will, not only for one mile each way, but for greater distances. The courts have been careful to limit the movement of defective cars to the carrier upon whose line of road they became defective, and even in those instances the movements were restricted to those actually necessary for purposes of repair.

CONCLUSION

In conclusion it is respectfully submitted that as the movement of cars having defective safety appliances is by the statute limited to the carrier upon whose line of road they became defective, and as the cars in this case did not become defective while being used upon appellee's line of road, the appellee has violated the Safety Appliance Acts in hauling the cars in the manner previously referred to. Since appellee knew that the cars were defective *before* it received them, it cannot be heard to say that it was making only the movements necessary to disconnect and reject the cars.

It is further submitted that what appellee actually did in this case constituted an acceptance and hauling of the cars in violation of the plain terms of the statute and the judgment of the district court should be reversed.

Respectfully submitted.

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APRIL 1946.

U. S. GOVERNMENT PRINTING OFFICE: 1946